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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

THE DOMINICAN REPUBLIC and
INSTITUTO de AUXILIOS y VIVIENDAS
Petitioners,

vs.

CHARLES V. MEADOWS AND
GEORGE HARRIS
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. In determining whether jurisdiction exists over a foreign sovereign under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), which permits jurisdiction to be asserted only when the cause of action is based on acts that cause a direct effect in the United States, may a court consider the general diplomatic and commercial contacts of the sovereign with the United States that are wholly unrelated to the cause of action?

2. May a court, consistent with due process, interpret the Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq., to permit the exercise of jurisdiction over a

foreign sovereign based on the contacts of the sovereign with the entire United States rather than the forum state?

3. May a court find subject matter jurisdiction under the "direct effect" clause of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), solely on the basis of a promise to pay a commission somewhere in the United States?

4. Upon a timely motion to set aside a default judgment, may a court refuse to consider whether a foreign sovereign is juridically separate from an independent governmental entity, when the question of juridical separateness determines the existence of jurisdiction over

the sovereign under the Foreign Sovereign Immunities Act, 28 U.S. §§ 1602 et seq.?

5. May a Court ignore the fact of a defendant's foreign sovereignty and the strength of that sovereign's defense to the action in deciding whether to set aside a default judgment entered against a foreign sovereign and a juridically separate entity?

LIST OF PARTIES

Defendants-petitioners are the Government of the Dominican Republic and the Instituto de Auxilios y Viviendas, a separate and independent juridical entity from the Dominican Republic. Plaintiffs-Respondents are Charles Meadows and George Harris, two individuals. Mr. Meadows is now deceased.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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Petitioners (defendants below) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported in Meadows v. Dominican Republic, 817 F.2d 517 (9th Cir. 1987). It is contained in the Appendix at 1. The Ninth Circuit's Order denying, over dissent, defendants' Petition for Rehearing and Suggestion of Rehearing En Banc is unreported. It is in the Appendix at 73.

The decision of the District Court giving rise to the instant proceedings is reported in Meadows v. Dominican Republic, 628 F.Supp. 599 (N.D.Cal. 1986). It is in the Appendix at 29. The District Court's Order denying petitioner's Motion for Reconsideration (February 25, 1986) is unreported and is in the Appendix at 72.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on May 14, 1987, affirming the decision of the United States District Court for the Northern District of California, dated February 5, 1986. Defendants' timely Petition for Rehearing and Suggestion of Rehearing En Banc was denied over dissent on July 30, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves Articles I, II and III of the Constitution of the United States; the due process clause of the Fifth Amendment; 28 U.S.C. § 1330; the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq., and Rules 12(b), (h), 55(c) and 60(b) of the Federal Rules of Civil Procedure. These provisions are set forth in the Appendix at 75-111.

STATEMENT OF THE CASE

The instant suit involves the liability of the Dominican Republic and the juridically separate Instituto de Auxilios y Viviendas (hereinafter "Institute") for a commission to plaintiffs based on an alleged contract to procure a loan.

Plaintiffs' complaint alleged that the Institute breached a contract promising to pay a commission for the procurement of a loan. Both the Ninth Circuit and the district court held that the only contact with the United States relevant to the claim was that on September 6, 1976 the Institute sent a copy of a letter to plaintiffs setting forth the terms of the loan sought. The courts assumed that the letter promised to pay the alleged commission in the United States. See Meadows, 817 F.2d at

523 (1987) (App. 24); Meadows, 628 F.Supp. at 605 (N.D. Cal. 1986) (App. 46).

The Institute refused payment of the commission because the loan had been procured without the intervention of plaintiffs. Plaintiffs filed their complaint on December 29, 1980, naming both the Institute and the Dominican Republic as defendants. (CR 1) It is undisputed, however, that the Dominican Republic took no part in any of the transactions underlying the cause of action.

Due to inadvertent misinterpretations of United States law by officials in the Dominican Republic, defendants did not respond to the Complaint. The district court first entered default and then dismissed the complaint sua sponte for lack of jurisdiction. (CR 22)

Subsequently, the district court entered a second default judgment on behalf of the plaintiffs for $240,000 plus prejudgment interest at 5.10% per annum commencing February 22, 1977 through May 29, 1984 ($104,569.49) and post judgment interest at 10.64% per annum. (CR 50) The amount now claimed is nearly $500,000.

On April 10, 1985, defendants timely moved, pursuant to Rules 55(c) and 60(b), Fed. R. Civ. P., to vacate entry of the default and final judgment. (CR 56, 57) This motion was denied by the district court, Meadows, 628 F.Supp. 599 (App. 29), as was a motion for reconsideration (App. 72). The decision of the district court was upheld on appeal. Meadows, 816 F.2d 517 (App. 1).

In moving to set aside the default, defendants argued that the district court

could not base its determination of personal jurisdiction over defendants on the general diplomatic and business contacts of the Dominican Republic with the United States unrelated to the cause of action. Both courts, however, ruled that reliance on such contacts was proper. See 817 F.2d at 523 (App. 25); 628 F.Supp. at 607 (App. 49-54).

The Dominican Republic also argued that because the Institute was a separate juridical entity under Dominican law, its acts were not attributable to the Republic. As recognized by the district court, "[i]f that were so, the latter [Dominican Republic] would not be properly joined as a defendant and its contacts with the United States would afford no basis for personal jurisdiction over the Institute which presumably has none." 628 F.Supp. at 608 (App. 63).

While recognizing the validity of this defense, both courts declined to reach the issue of juridical separateness on the grounds that it was a matter of substantive law, not jurisdiction and was therefore not available as a basis for setting aside the default judgment. 817 F.2d at 524 (App. 26-27); 628 F.Supp. at 608 (App. 63-64).

Because of the importance of the issues raised by this case, defendants petitioned the Ninth Circuit for rehearing and suggested rehearing en banc. Judge Stephens, District Judge, sitting by designation, recommended rehearing en banc. The court, however, denied the petition on July 30, 1987. (App. 73).

REASONS FOR GRANTING THE WRIT

Introductory Statement

In basing its assertion of jurisdiction over defendants on the general diplomatic and business contacts of the Dominican Republic unrelated to the cause of action, the Ninth Circuit is in conflict with other Circuits. Further, the refusal of both courts below to consider the issue of juridical separateness after default conflicts with decisions of this Court. Finally, the Ninth Circuit's reading of the FSIA raises several significant recurring questions of statutory interpretation, having a serious impact on foreign affairs, that should be resolved by this Court.

Prior to passage of the FSIA, sovereign immunity of foreign nations was determined by both the State Department

and the courts. Because of this shared responsibility, decisions regarding sovereign immunity lacked consistency and were unpredictable. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983). The FSIA was intended to remedy this situation and was drafted as the "sole and exclusive standards" for determining the immunity of foreign countries in United States Courts. H.R. Rep No. 1487, 94th Cong., 2d Sess. 12 (1976) reprinted in 1976 U.S. Code Cong. and Admin. News 6610 (hereinafter "H. Rep.").

Despite this goal of fostering consistency, the statute aptly has been said to "present[] a peculiarly twisted exercise in statutory draftsmanship." Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir.

1984) (Higginbotham J., concurring and dissenting). See also Castillo v. Shipping Corp. of India, 606 F.Supp. 497, 499 (S.D.N.Y. 1985). Decisions regarding its interpretation often conflict, see Vencedora, 730 F.2d at 199-200 and discussion therein; and to date there has been little guidance from this Court as to its proper interpretation.

The need for uniformity of interpretation in the determination of foreign sovereign immunity is manifest. Without such uniformity, the immunity of a foreign sovereign will differ depending upon in which United States federal judicial district or circuit it is called to court. The law of sovereign immunity will regress to the unpredictable state in which it existed prior to the enactment of the FSIA.

Furthermore, the FSIA involves an attempt by Congress to bring order to an area of law that involves sensitive foreign policy interests of the United States, where the Congress and the Courts gingerly share responsibilities with the Executive Branch. See Dames and Moore v. Regan, 453 U.S. 654, 660-61 (1981); United States v. Curtiss-Wright Export Corp., 290 U.S. 304, 319 (1936); Note, Jurisdiction Over Foreign States for Acts of their Instrumentalities: A Model for Attributing Liability, 94 Yale L.J. 394, 395 (1985).

Because of the delicate inter-relation of executive, legislative and judicial responsibilities under the FSIA, and because "[a]ctions against foreign sovereigns raise sensitive issues concerning the foreign relations of the United States," Verlinden, 461 U.S. at

493, it is crucial to proper operation of the statute, and to the conduct of American foreign affairs that there be uniformity of interpretation of the FSIA. See H. Rep. at 6631. Important unresolved recurrent issues of its scope and application should be decided expeditiously by this Court. Such are the issues presented here, some of which already involve serious conflicts among the Circuits.

I. In Determining what Contacts of a Foreign Sovereign Establish Jurisdiction Under Section 1605(a)(2) of the FSIA, the Ninth Circuit's Ruling Conflicts With Decisions of Other Circuits and of This Court, Seriously Distorts the Meaning and Intent of the Statute, and Addresses Important Unresolved Recurring Issues of Law that This Court Should Decide.

A. The Ninth Circuit's Ruling That a Court May Consider General Diplomatic and Business Contacts of a Foreign Sovereign in Determining Jurisdiction Under Section 1605(a)(2) of the FSIA is in Conflict With the Holdings of Other Circuits.

The FSIA provides that the same contacts that abrogate sovereign immunity also establish subject matter jurisdiction and prescribe the contacts necessary for personal jurisdiction. Thus, the "immunity provisions ... prescribe the necessary contacts which must exist before the Courts can exercise personal jurisdiction." H. Rep. at 6612. See 28 U.S.C. § 1330; Verlinden, 461 U.S. at 485 n.5.

The specific immunity provision at issue here, 28 U.S.C. § 1605(a)(2), provides that a foreign state is not immune from the jurisdiction of the courts of the United States in any case

> in which the action is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

This provision requires that the courts, in determining sovereign immunity, subject matter jurisdiction and personal jurisdiction, examine only the single set of contacts giving rise to the cause of action. General contacts unrelated to the cause of action are irrelevant and cannot be considered by the court in evaluating personal jurisdiction. In effect, the Act has eliminated the "doing business/mere presence" basis for jurisdiction. See Vencedora, 730 F.2d at 202; Verlinden B.V. v. Central Bank of Nigeria, 488 F.Supp. 1284, 1295-96 (S.D.N.Y. 1980), aff'd on other grounds, 647 F. 2d 320 (2d Cir. 1981), reversed and remanded on

other grounds, 461 U.S. 480 (1983); Gibbons v. Udaras na Gaeltachta, 549 F.Supp. 1094, 1109 (S.D.N.Y. 1982); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F.Supp. 981, 988 (N.D. Ill. 1980).[1/]

In contrast to the holdings of and in the Second, Fifth and Seventh Circuit courts cited above, in the instant case the Ninth Circuit and the district court ruled that a court may rely on the general diplomatic or business contacts of a foreign sovereign unrelated to the cause of action, in determining

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1/ While several of these cases involve clauses 1 or 2 of § 1605(a)(2), rather than clause 3 at issue here, the distinction is immaterial, as the acts "sued upon and the Commercial activity connected with those acts [must] bear a relationship to the United States specified by either clause 1, clause 2, or clause 3 of section 1605(a)(2)." Gibbons v. Udaras, 549 F.Supp. at 1111.

jurisdiction. See Meadows, 817 F.2d at 523 (App. 25); Meadows, 628 F.Supp. at 606 (App. 49-54).

The Ninth Circuit's ruling effectively broadens the grant of jurisdiction over foreign states beyond what Congress intended. See H. Rep. at 6616 (FSIA starts from a premise of immunity, which may be of some advantage to foreign states in doubtful cases.); Verlinden, 461 U.S. at 488 (1983) (foreign state normally immune from jurisdiction of federal and state courts).

Under the Ninth Circuit's decision, any sovereign that merely maintains some diplomatic presence or "does business" in the United States unrelated to the cause of action can be held subject to the jurisdiction of the federal courts anywhere in the United States even for

acts within the meaning of 28 U.S.C. § 1605(a)(2)(iii) that in themselves are insufficient to satisfy the minimum contacts due process test with either the forum judicial district or the United States. See Asahi Metal Industry Co., Ltd. v. Superior Court of California, ___ U.S.___, 94 L.Ed.2d 92 (1987).

The Ninth Circuit's decision thus has, in effect, abrogated any concept of sovereign immunity for a nation that maintains some diplomatic or consular presence in the United States. This drastic reinterpretation of the FSIA, to permit the "doing business" basis for jurisdiction is far too broad. It conflicts with the decisions of and in other circuits and distorts the language of the statute in such a way as to engender serious difficulties in foreign relations. To address these issues this

Court should grant the Petition for the Writ of Certiorari.

B. The Ninth Circuit's Interpretation of the Foreign Sovereign Immunities Act as Permitting Jurisdiction based on the Contacts of a Foreign Sovereign with the United States as a Whole Raises a Serious Question Under the Due Process Clause of the Fifth Amendment Recently Noted by This Court that Should Now be Decided.

In evaluating jurisdiction under the FSIA, both the district court and the Ninth Circuit held that national contacts are a proper basis for jurisdiction. See Meadows, 817 F.2d at 523 (App. 25); Meadows, 628 F.Supp. at 606-07 (App. 54-60). Other Circuits have also so held. See e.g., Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300,314 (2nd Cir. 1981).

The constitutionality of reliance on nationwide contacts to assert personal jurisdiction is a question specifically left open by this Court in Asahi, 94 L.Ed. 2d 92 (1987).

In Asahi, this Court reversed a state court ruling of jurisdiction over a defendant who placed its products in the stream of commerce. The Court also raised but did not resolve the question of "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts rather than on the contacts between the defendant and the State in which the federal court sits." Id. 94 L.Ed.2d at 105 n *.

Asahi suggests that such exercise of jurisdiction over a foreign defendant

would offend "traditional notions of fair play and substantial justice." Id. at 105 (quoting International Shoe Co. v. Washington, 326 U.S. at 316).

Given the importance of the issues of sovereign immunity and jurisdiction under the FSIA, as well as the Fifth Amendment issue raised, this Court should grant the Petition for Writ of Certiorari to decide the issue left open in Asahi, i.e., whether Congress may base jurisdiction on the aggregate of national contacts.

C. The Ninth Circuit's Assertion of Jurisdiction over a Foreign Sovereign Based Solely on A Promise to Pay a Commission Somewhere in the United States Raises Serious Unresolved Questions of Federal Law that This Court Should Resolve and is an Impermissible Extension of the Direct Effects Test of the FSIA that Violates Due Process.

In Asahi, this Court cautioned

against too liberal an extension of personal jurisdiction in the international field, warning that in cases involving alien defendants, the courts should demonstrate "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." 94 L.Ed.2d at 106.

The only contact relied upon by the district court and Ninth Circuit in this case to satisfy the "direct effect" clause of § 1605(a)(2) was the fact that the defendants had allegedly agreed to pay a commission somewhere in the United States. See Meadows, 817 F.2d at 523 (App. 24); Meadows 628 F.Supp. at 604-05 (App. 46). Whether a foreign sovereign may be held subject to United States jurisdiction based solely on an ambiguous

promise to pay a commission somewhere unspecified in the United States, when all aspects of the relevant transaction had been carried out on foreign soil, raises serious questions that this Court ought to resolve; i.e., does such an extension of jurisdiction offend all "traditional notions of fair play and substantial justice," and this Court's warning against unreasonable assertions of jurisdiction. See Asahi, 94 L.Ed.2d at 105-07.

The "direct effects" clause of the FSIA, 28 U.S.C. § 1605(a)(2) is frequently used as a basis for asserting jurisdiction over foreign sovereigns. See, e.g. Texas Trading 647 F.2d 300 (2d Cir. 1981); Wyle v. Bank Melli of Tehran, Iran, 577 F.Supp. 1148 (N.D. Cal. 1983); Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985); Schmidt v. Polish

People's Republic, 579 F. Supp. 23 (S.D.N.Y. 1984). It is imperative therefore that this Court promptly clarify the meaning of that clause. Without such clarification, foreign sovereigns will have no basis for ascertaining what acts will subject them to United States jurisdiction.

II. The Ninth Circuit's Refusal to Address a Meritorious Defense to the Exercise of Jurisdiction Over Defendants Conflicts With Decisions of This Court and Other Circuits.

A. The Ninth Circuit's Refusal to Address the Issue of Juridical Separateness as a Basis for Defending Against Federal Jurisdiction under the FSIA Conflicts with Decisions of This Court and of Other Circuits.

The FSIA presumes that a foreign state or instrumentality is immune from jurisdiction of the United States courts unless one of the enumerated exceptions of the statute applies. Verlinden B.V.

v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). The only relevant exception here is found in 28 U.S.C. § 1605(a)(2), which requires that the sovereign must have performed some act which causes a "direct effect" in the United States.

There is no dispute that the Dominican Republic performed no acts relating to the cause of action which caused a "direct effect" in the United States. The only basis for holding the Dominican Republic liable is for the act of the Institute, on an "alter ego" theory.

As recognized by both the Ninth Circuit and the district court, however, the Dominican Republic may well be juridically separate from the Institute, in which case the acts of the Institute would not be attributable to it. See Meadows, 817 F.2d at 524 (App. 26-28);

Meadows, 628 F.Supp. at 608 (App. 63). The Dominican Republic itself therefore had no contacts that would meet the "direct effect" requirement of § 1605(a)(2) and any assertion of jurisdiction over the Republic is void. As the district court stated, if the Institute is juridically separate from the Dominican Republic, the Republic "would not be properly joined as a defendant and its contacts with the United States would afford no basis for personal jurisdiction over the Institute which presumably has none." 628 F.Supp. at 608 (App. 63).

The juridical separateness defense is unusually powerful. As this Court has observed, the presumption of juridical separateness is so strong it may be overcome only by evidence that rises nearly to the level of fraud. See First

National City Bank v. Banco Para el Comericio Exterior de Cuba, 462 U.S. 611, 629-30 (1983). Accord Hercaire International, Inc. v. Argentina, 821 F.2d 559, 564 (11th Cir. 1987).

Despite the power of the defense, both the Ninth Circuit and the district court declined even to address the issue of juridical separateness. They held that the question of juridical separateness is one of "substantive law" rather than jurisdiction and need not be addressed when raised in a motion to set aside a default. 817 F.2d at 524 (App. 26-28); 628 F. Supp. at 608. (App. 63-65).

This Court stated in Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485-86, n.5 (1983) that "both statutory subject-matter jurisdiction (otherwise known as 'competence') and

personal jurisdiction turn on application of the substantive provisions of the Act." (emphasis added). Thus, in order to make a finding of jurisdiction under the FSIA, a court must look both at substantive law and the facts of the underlying cause of action presented to it. The Ninth Circuit's refusal to consider an issue of "substantive" law and its claim thereby to have avoided a jurisdictional decision, is at odds with this Court's interpretation of the FSIA in Verlinden.

Furthermore, questions of subject matter jurisdiction may be raised at any time, including on a motion to set aside a default. See Rules 12(b), (h); and 60(b), Fed. R. Civ. P. This Court has held repeatedly that it is the duty of the Court to inquire at any time into the issue of jurisdiction. "This question

[of jurisdiction] the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." Bender v. Williamsport Area School District, __ U.S. __, 89 L.Ed.2d 501, 514 (1986) (quoting Mansfield C. and L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)).

When a question of jurisdiction is raised, the court must go beyond the pleadings and inquire by affidavits or otherwise into the facts. Id. and n.8; KVOS v. Associated Press, 299 U.S. 269, 278 (1936); McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 184 (1936). Where as here, a statute specifically defines the prerequisites to jurisdiction, "the District Court is vested with authority to inquire at any time, whether these conditions have been met." McNutt, 298 U.S. at 188, 189

(emphasis added). The courts below therefore had a duty to inquire into the jurisdictional facts at issue here with respect to juridical separateness and their refusal to do so conflicts with established Supreme Court precedent.

Finally, this Court has stressed the importance of the concept of juridical separateness to the operation of world trade and foreign relations and in particular to the development of Third World Countries. "[G]overnments in developing countries [frequently] establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large scale national investments." First National City Bank, 462 U.S. at 625. If courts are to freely ignore the separate status of government instrumentalities:

> the efforts of sovereign nations to structure their governmental

> activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated. Due respect for the actions taken by foreign sovereigns and for principles of comity between nations ... leads us to conclude ... that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.
>
> Id. at 626-27.

Numerous other courts have acknowledged the crucial importance of the issue of juridical separateness in determining jurisdiction over foreign entities or execution over foreign property. See e.g., Hercaire, 821 F.2d 559; Letelier v. Republic of Chile, 748 F.2d 790, 794 (2d Cir. 1984), cert. denied, 471 U.S. 1125; Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-07 (D.C. Cir. 1982), cert. denied, 464 U.S. 815; Wyle v. Bank Melli of Tehran, Iran, 577

F.Supp. 1148, 1159 (N.D.Cal 1983); Gibbons v. Republic of Ireland, 532 F.Supp. 668, 670 (D.D.C. 1982). In striking contrast to the above decisions the Ninth Circuit and district court refused even to address the question of juridical separateness.

The decision in the instant case has a direct impact on the conduct of our foreign affairs, and on the ability of foreign nations and agencies to carry on trade with the United States. Given the conflict of the lower courts' decisions in the instant case with prior decisions of this Court and other circuit and district courts and the importance of these issues, this Court should grant the Petition for Writ of Certiorari.

B. The Ninth Circuit's Refusal to Set Aside the Default Against a Foreign Sovereign That has a Powerful and Complete Defense Conflicts With the Decision of Other Circuits Concerning the Appropriate Standards for Setting Aside Default Judgments Entered in FSIA Cases.

A motion under Rule 60(b) Fed. R. Civ. P. to set aside a default is directed to the discretion of the court. Klapprott v. United States, 335 U.S. 601, 614-15 (1949). That discretion is severely limited, however, in cases involving foreign sovereigns under the FSIA. By its terms, for example, the FSIA provides that no default may be entered unless "the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. §1608(e). This requirement is identical to Fed. R Civ. P. 55(e), limiting default judgments against the United States and appears to be a recognition

that foreign states must be treated with respect and liability be imposed only for valid claims. It is thus incumbent upon courts to consider defenses available to foreign sovereigns, even when the sovereign did not appear or did not assert those defenses. See Hanoch Tel-Oren v. Libyan Arab Republic, 517 F.Supp. 542, 550-51 n.4 (D.D.C. 1981) aff'd 726 F.2d 774 (D.C. Cir. 1984), cert. denied 470 U.S. 1003 (1985), Frolova v. USSR, 558 F.Supp. 358 (N.D. Ill. 1983) aff'd 761 F.2d 370 (7th Cir. 1985).

Contrary to the requirements of the FSIA and to the interpretations in other Circuits, the district court here neglected to identify and examine a valid and complete defense before defendants appeared, and refused to address it even after they appeared and asserted that

defense. Thus, even assuming arguendo that the Ninth Circuit was correct in its determination of the "substantive" rather than jurisdictional character of the juridical separateness defense, its refusal to allow the defendants to present that defense disregards the appropriate standards under the FSIA for passing on a foreign sovereign's motions to set aside default judgments.

Furthermore, when dealing with foreign sovereigns, the courts must consider the foreign policy implications of a default judgment as well as the foreign sovereign's unfamiliarity or misconceptions about American law and the fact that concepts of international law are in a state of flux, moving from the idea of an absolute to a more limited sovereign immunity. See H. Rep. at 6606-08; Jackson v. Peoples Republic of

China, 794 F.2d 1490, 1496 (11th Cir. 1986). In Jackson, the Eleventh Circuit relied on precisely these factors in setting aside a default judgment against the People's Republic of China, based on the "existence of pregnant questions relative to the jurisdiction of the Courts" and the need to resolve those questions in the context of adversarial hearings. Id. at 1496 and n.3.

In contrast to the Eleventh Circuit, the Ninth Circuit did not address any of the special policy concerns involved with entering defaults against foreign sovereigns and declined even to address the question of whether a meritorious defense existed. See Meadows, 817 F.2d at 522 (App. 17-18). This failure is all the more significant given the fact that the Dominican Republic's principal

defense is so powerful. See Hercaire, 821 F.2d at 564.

Because of this conflict in approach among the Circuits, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SANFORD JAY ROSEN (Counsel of Record)
Attorneys for Petitioners

DATED: September 17, 1987

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE DOMINICAN REPUBLIC and
INSTITUTO de AUXILIOS y VIVIENDAS

Petitioners,

vs.

CHARLES V. MEADOWS and
GEORGE HARRIS

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES V. MEADOWS, GEORGE HARRIS,	)	
Plaintiffs-Appellees/ Cross-Appellants,	)	No. 86-1785 and 86-1843
v.	)	D.C. NO.
	)	CV 80-4626-WWS
THE DOMINICAN REPUBLIC; and INSTITUTO, DE AUXILIOS Y. VIVIENDAS,	)	OPINION
Defendants-Appellants/ Cross-Appellees.	)	

Argued and Submitted
January 16, 1987
San Francisco, California

Filed May 14, 1987

Before: Procter Hug, Jr. and Arthur L. Alarcon, Circuit Judges, and Albert Lee Stephens, Jr.,*/ (District Judge).

Opinion by Judge Alarcon

Appeal from the United States District Court for the Northern District of California
William W. Schwarzer, District Judge Presiding

---

*/ Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

OPINION

ALARCON, Circuit Judge:

The Dominican Republic (hereinafter Republic) and the Instituto De Auxilios Y Viviendas (hereinafter Instituto or, collectively, appellants) appeal from the denial of their motion to vacate the entry of the default judgment entered against them and the denial of their motion for reconsideration. Appellants contend that the district court lacked subject matter jurisdiction to enter a default judgment in this matter because the Republic was improperly named as a defendant. They also argue that the court lacked personal jurisdiction over the Instituto. Finally, appellants assert that the court erred in concluding their default was not the result of excusable neglect. We reject each of these contentions.

PERTINENT FACTS AND PROCEDURAL HISTORY

The district court entered a default judgment based on a showing by the plaintiff Charles V. Meadows (hereinafter Meadows) that he was not paid a two percent commission owed to him for obtaining a $12 million loan for the Instituto. Meadows was requested to obtain the loan commitment by Dr. Marion A. Fernandez Mena (hereinafter Mena), the Secretary of the Republic and the General Administrator of the Instituto. Subsequently, plaintiff George Harris (hereinafter Harris or, collectively, appellees) contacted Sir Thomas Buxton, a lender in London, to obtain the money sought by Mena. Buxton advised Meadows and Harris that funding in the amount requested was available. Meadows then informed Mena of the terms and conditions for the loan.

Mena issued a mandate for the loan application to Meadows on September 6, 1976. The mandate was recorded in the Office of the Consulate of the United States. The letter referred to a two percent commission, although it did not specify to whom the commission was to be paid. The letter also did not indicate that any action other than performance was required of plaintiffs. In December 1976, the Instituto received a loan commitment for $12 million from Citibank Nassau's Santo Domingo branch on terms similar to those specified in the September mandate.

In February of 1977, Mena advised Meadows that the loan proceeds had arrived. Mena thanked Meadows for the arrangements and acknowledged that Meadows' commission of $240,000 was due and owing. Meadows and Harris then

engaged in a series of attempts by telephone to secure the commission. They received only evasions and excuses.

Thereafter Meadows received a letter from Mena stating that the money had been received on February 14, 1977, and that the Republic wanted Meadows' assistance in securing another loan of $20,000,000 on behalf of the Instituto. No reference was made to the commission due on the previous loan.

During a later telephone conversation, Mena told Meadows that he would get a larger commission if he would obtain a second loan. Meadows told Mena he would not assist in procuring a second loan until his original commission was paid. Meadows and Harris were subsequently refused payment by Citibank of New York and by the Instituto.

Meadows attempted to obtain counsel in the Republic, but was told that it would be politically unwise for a Dominican lawyer to represent him. Meadows then retained American counsel, who traveled to the Republic in 1980 in order to discuss payment of the commission with counsel for the Instituto. Payment was refused without explanation. Meadows and Harris filed an action for breach of contract in the District Court for the Northern District of California on December 19, 1980.

On February 11, 1981, Meadows and Harris attempted to serve the Republic and the Instituto with summons and a copy of the complaint by mail addressed to the Secretary of State of the Republic and to Mena, with return receipt requested. No return receipts were received.

On April 28, 1981, they followed the same procedure and mailed the summons and a copy of the complaint to the Head of the Ministry of Foreign Affairs of the Republic and to Mena in his capacity as the Administrator General of the Instituto. Again, no return receipts were received.

On June 17, 1981, Meadows and Harris sent a letter to the United States Department of State, witnessed by the clerk of the district court, as required by 28 U.S.C. § 1608(a)(4) requesting service on the Republic. On October 1, 1981, the United States Department of State informed the clerk of the court in writing that service had been effected on the Foreign Ministry of the Republic on September 10, 1981. The clerk was also advised that the Republic had been given detailed warnings of the legal

consequences that would result from a failure to respond to the complaint.

The Republic and the Instituto did not respond. Default was entered November 16, 1981. Thereafter, the court dismissed the complaint sua sponte for failure to allege facts sufficient to establish personal jurisdiction over the defendants. Meadows and Harris appealed to this Court. We remanded the action to the district court with instructions to permit the filing of an amended complaint. Meadows v. Dominican Republic, No. 82-4450, memorandum (9th Cir. Sept. 29, 1983).

Meadows and Harris filed affidavits in the district court on the jurisdictional issue. On June 1, 1984, a second default judgment was entered against the

Republic and the Instituto in the amount of $240,000 plus interest.

On September 4, 1984, Meadows and Harris mailed copies of the default judgment to the Republic. The Republic's Undersecretary of Foreign Affairs forwarded a copy to the Instituto. No return receipt, however, was sent back to the plaintiffs. Meadows and Harris again served notice of the judgment on the Republic and the Instituto by mail in February 1985. The United States Department of State finally served notice of the judgment on the Secretary of Foreign Services of the Republic in March 1985. A return receipt of the February 1985 mailing was eventually received from the Instituto in April 1985.

The Republic and the Instituto filed a motion to set aside the default judgment and a motion for reconsideration.

The district court found both motions to be timely, but denied them. Meadows v. Dominican Republic, 628 F.Supp. 599 (N.D.Cal. 1986). The Republic and the Instituto appealed those denials, and Meadows and Harris cross-appealed the finding of timeliness.

DISCUSSION

1. Timeliness Of Defendants' Motion To Vacate

In their cross-appeal, Meadows and Harris contend that the motion to set aside the default judgment for excusable neglect under Rule 60(b)(1)[1/] should have

---

1/ Rule 60(b) provides in pertinent part that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) . . . excusable

(Footnote Continued)

been denied because it was untimely. A motion to vacate a default judgment for excusable neglect pursuant t Fed.R.Civ.P. 60(b)(1) must be made within one year. Fed.R.Civ.P. 60(b). Such a motion may be denied, although it was filed within the one year period, if the district court finds that the defendant was guilty of laches or unreasonable delay. 7 J. Moore & J.D. Lucas, Moore's Federal Practice, ¶ 60.22[4] (2d ed. 1985); Amoco Overseas Oil v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 656 (2d Cir. 1979); Mayfair Extension, Inc. v. Magee, 241 F.2d 453, 454 (D.C. Cir. 1957). There is no time limit

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(Footnote Continued)

neglect; . . . (4) the judgment is void; . . . . The motion shall be made within a reasonable time, and for reasons, (1),(2), and (3) not more than one year after the judgment, . . . was entered . . . .

on a Rule 60(b)(4) motion to set aside a judgment as void. 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2862, Rule 60 (1973); Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965).

The district court concluded that the motion to set aside the default under Rule 60(b)(1) was timely filed because less than one year had elapsed from the entry of the judgment, and no attempt had been made to execute on the judgment. While reasonable minds might differ in ruling on the timeliness of the motion, based on all the facts and circumstances in the record, the court's ruling was not unreasonable. The district court did not abuse its discretion in ruling that the motion was timely filed.

2. Denial Of Defendants' Motion To Vacate The Default Judgment

A. Standard of Review

Factual findings of the district court with respect to Rule 60(b) motions are reviewed for clear error. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Dollar Rent A Car of Washington, Inc. v. Travelers Indemnity Co., 774 F.2d 1371, 1374 (9th Cir. 1985). If findings are undisputed or are not clearly erroneous, then the court's determination is reviewed for abuse of discretion. Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc) (applying abuse of discretion standard to excusable neglect finding on a Rule 60(b)(1) motion).

We have held that we will reverse such a ruling "only upon a clear showing of abuse of discretion." Pena v. Seguros La Comercial, S.A., 770 F.2d 811,

814 (9th Cir. 1985) (adding emphasis and citing Ellis v. Bhd. of Ry., Airline & Steamship Clerks, 685 F.2d 1065, 1071 (9th Cir. 1982), aff'd in relevant part, 466 U.S. 435 (1984)). This discretion is limited by three considerations. First, since Rule 60(b) is remedial in nature, it must be liberally applied. Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974). Second, default judgments are generally disfavored and cases should be decided on their merits. Id. Third, where defendant seeks timely relief from the judgment and has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the judgment. Id.

A district court has the discretion to deny a Rule 60(b)(1) motion, however, if (1) the defendant's culpable conduct led to the default, (2) the defendant has

no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside. Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985) (citing Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam)). If a default judgment is entered as the result of defendant's culpable conduct, however, we need not consider whether a meritorious defense was shown, or whether the plaintiff would suffer prejudice if the judgment were set aside. Id. at 815; Benny v. Pipes, 799 F.2d 489, 494 (9th Cir. 1986).

B. Culpable Conduct or Inexcusable Neglect

A defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer. Pena, 770 F.2d at 815; Benny, 799 F.2d at 494. Here, the Republic and the Instituto received

actual notice of the complaint and intentionally declined to answer.

Appellants claim that their failure to answer was due to excusable neglect. They argue that they acted on the advice of counsel in failing to respond after receiving actual notice of the filing of the complaint. Appellants rely on an anonymous memorandum from an Advisory Commission stating that the Republic should not appear or be represented. The record shows that the person upon whose advice appellants originally claim to have relied, Pedro Tonos, the Republic's Undersecretary of Foreign Affairs, denied responsibility for the decision not to respond.

Furthermore, appellants were aware of relevant federal law. The district court found that defendants were fully informed of the legal consequences of

failing to respond by the United States Department of State. The district court also found that the Republic was sufficiently sophisticated and experienced in the requirements of American law to protect its interests, based on its involvement in other actions in United States courts. See, e.g., Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378-80 (5th Cir. 1980)(Dominicana Airlines, wholly owned by the Dominican Republic found to have engaged in commercial activities and therefore not protected by sovereign immunity).

Under the circumstances presented in the record, the district court did not abuse its discretion in finding that appellants' default was intentional, culpable, and inexcusable under Rule 60(b)(1). Because appellants' neglect was inexcusable, we need not

determine whether the record shows a meritorious defense or prejudice to the appellees. Pena, 770 F.2d at 815; Benny, 779 F.2d at 494.

3. The Judgment Was Not Void

The appellants further attack the judgment as void for want of jurisdiction. Whether a judgment is void is a question of law reviewable de novo on appeal. See, e.g., Redding Ford v. California State Bd. of Equalization, 722 F.2d 496, 497 (9th Cir. 1983), cert. denied, 105 S.Ct. 84 (1984).

A. Subject Matter Jurisdiction

The Republic and the Instituto claim that the district court lacked subject matter jurisdiction over this matter under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-11 (1976) (hereinafter FSIA). We disagree.

The FSIA sets forth a restrictive theory of sovereign immunity. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487 (1983). Under the restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." Id.

The legislative history of section 1604 explains that FSIA

> starts from a premise of immunity and then creates exceptions to the general principle. . . . Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state--that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie

> evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 1487, 94th Cong., 2d sess., reprinted in 1978 Code Cong. & Ad. News 6604, 6616. See also Arango, 621 F.2d at 1378 (party claiming immunity under FSIA has burden of demonstrating that exceptions do not apply). In West v. Multibanco Comermex S.A., 807 F.2d 820 (9th Cir. 1987), we stated that "the presumption under FSIA is that actions taken by foreign states or their instrumentalities are sovereign acts and thus protected from the exercise of our jurisdiction, unless one of the enumerated exceptions of FSIA applies." Id. at 824. Thus, where, as here, the plaintiff alleges in his commercial acts, the defendant must establish a prima facie

case that it is a sovereign state and that the plaintiff's claim arise out of a public act. This proof establishes a presumption that the foreign state is protected by immunity. The plaintiff then has the burden of going forward with the evidence by offering proof that one of the FSIA exemptions applies. Once the plaintiff has presented this evidence, the defendant must prove its entitlement to immunity by a preponderance of the evidence. See Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 255-56 (7th Cir. 1983). The FSIA exemption to the defense of foreign sovereign immunity relied upon by the appellees provides in pertinent part that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based . . . upon an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere and that

act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

Appellees have presented evidence that appellants engaged in commercial activities. Appellants have failed to meet their burden of persuasion that this exception does not apply.

The term "commercial activity" applies to an agreement that might be made by a private person, notwithstanding the fact that the goods or services to be procured through the contract are to be used for a public purpose. H.R. Rep. No. 1487, at 16. A public activity is one which only a sovereign state can perform. MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326, 1328-29 (9th Cir. 1984), cert. denied, 469 U.S. 1037 (1984) (termination of agreement regarding right to regulate imports and

exports not a commercial activity because only a sovereign could so act).

Obtaining a loan commitment from a lender is a type of activity private persons perform. Thus, the Republic and the Instituto were engaged in a commercial transaction with Meadows and Harris.

A foreign state that engages in commercial activity may still be immune unless the action had a direct effect on a plaintiff. FSIA § 1605(a)(2); Australian Gov't Aircraft Factories v. Lynne, 743 F.2d 672, 674 (9th Cir. 1984).

The evidence must also show that the commercial activity caused that direct effect to occur in the United States. FSIA § 1605(a)(2); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). In Texas Trading, the Second Circuit held

that where the parties agree that money owing on a contract was to be collected in the United States, the failure to pay the plaintiff creates an effect in the United States. 647 F.2d at 312-13. The district court correctly applied Texas Trading to the matter before us. Meadows, 628 F.Supp. at 604. Meadows and Harris reside in the United States. Under the agreement, the commission was to be paid in the United States. As the district court noted, the contract provided that the "'transaction must be made through our bank . . . and through your [plaintiffs'] bank.' (emphasis added)." Id. at 605. Because the effect of the foreign state's commercial activity was in the United States, the record demonstrates that appellants were immune from suit in the district court.

B. Personal Jurisdiction

Appellants argued before the district court that the relevant contacts for personal jurisdiction under the FSIA must be within California, the forum state. The district court rejected this contention, relying on Texas Trading. In Texas Trading, the Second Circuit held that, where service is made under FSIA section 1608, "the relevant area in delineating contacts is the entire United States, not merely [the forum state]." 647 F.2d at 314. We agree with Judge Schwarzer's analysis of this issue, which appears at 628 F.Supp. 599 at 605-08, and adopt it as expressing the view of this Court. The record shows that the Dominican Republic has sufficient contacts in the United States to give the district court personal jurisdiction.

The district court also held that, because the Instituto was an agent of the Republic, in personam jurisdiction existed over the Instituto. 628 F.Supp. at 608. Appellants assert, however, that because the Instituto is an autonomous juridical entity, the Republic cannot be held liable for the Instituto's commercial activity. Appellants claim that the record does not show sufficient contacts in the United States to establish personal jurisdiction over the Instituto.

This contention was raised in the district court for the first time after the hearing on the motion to set aside the default judgment. The district court denied leave to file a supplemental memorandum on the ground that the issue of separate juridical entity is a question of substantive law, not subject matter jurisdiction. Appellants argue

that the issue of juridical separateness goes to subject matter jurisdiction and thus may be raised at any time. This argument is inconsistent with settled legal principles.

In First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 1620 (1983), the Supreme Court held that the question of identity for purposes of attribution of liability among instrumentalities of a foreign state is a matter of substantive law. Substantive law is defined as "[t]he basic law of rights and duties . . . as opposed to procedural law (. . . law of jurisdiction, etc.)." Black's Law Dictionary 1281 (5th ed 1979). Because the Republic and the Instituto failed to demonstrate excusable neglect, they were precluded from relying on the existence of a possible meritorious defense of

separate juridical entity as a basis for setting aside the default judgment.

The judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES V. MEADOWS, and GEORGE HARRIS, Plaintiffs, v. THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS, Defendants.	No. C-80-4626-WWS MEMORANDUM OF OPINION AND ORDER Filed Feb. 5, 1985

BACKGROUND FACTS

Defendants, the Dominican Republic and one of its executive agencies, Instituto De Auxilios Y Viviendas ("Instituto"), have moved, pursuant to Fed. R. Civ. P. 60(b)(1) and (4), to set aside the default judgment entered against them.

The documents before the Court establish the following facts. By letter of September 6, 1976, to plaintiffs in South Pasadena, California, the Instituto responded to plaintiffs' offer to obtain financing for it, requesting them to obtain a $12,000,000 loan on specified terms. According to plaintiff Meadow's declaration, plaintiffs had previously contacted a lender's agent in London and determined that funds would be available on those terms. The letter provided for a 2% commission payable on disbursement of the loan and specified that the transaction was to be made through a Dominican bank and plantiffs' bank. It is not clear from the letter whether plaintiffs were required to take any action other than performance in order to accept the offer.

In December 1976, the Instituto obtained a commitment for a $12 million loan from Citibank in Santo Domingo on terms similar to those specified in the earlier letter. On February 10, 1977, Citibank transmitted executed loan documents to the Instituto. By undated letter, evidently written shortly thereafter, the Instituto advised plaintiffs that the $12 million loan had been satisfactorily consummated and asked them for terms and conditions for a new loan of $20 million. According to plaintiff Meadows, the director of the Instituto called to thank him for arranging the loan. Later in February 1977, plaintiffs asked Citibank in New York for payment of their commission but were refused. The Instituto also rejected their later requests for payment.

After plaintiffs had made unsuccessful collection efforts in the Dominican Republic, they filed suit in this court on December 19, 1980. Service of process was made on defendants through the United States State Department under 28 U.S.C. § 1609(a)(4) after two unsuccessful attempts to serve by registered mail (defendants having failed to return the receipts). In September 1981, the United States Embassy in the Dominican Republic transmitted the summons and complaint to defendants with a note advising them of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ et seq. and enclosing a copy of it. The note also informed defendants that a failure to respond could result in a default judgment, that any jurisdictional defense must be raised in the court in which the action is pending, and that it is

advisable to consult counsel in the United States. Defendants do not dispute that proper service was made.

When defendants failed to answer or otherwise appear, plaintiffs moved for a default judgment. The judge to whom the case was then assigned dismissed the complaint sua sponte for failing to allege facts sufficient to establish personal jurisdiction over defendants. Plaintiffs' motion for reconsideration was denied as was their subsequent motion to transfer this action to the Southern District of New York.[1/]

1/ Defendants make much of the fact that shortly after filing this action, plaintiffs filed suit in the Southern District of New York solely against the Instituto. The significance they attach to this fact apparently relates to the issue of the Instituto's juridical separateness. In light of the Court's resolution of that issue, infra § C-4, this fact is irrelevant.

Plaintiffs then appealed to the Ninth Circuit, which dismissed the appeal as premature inasmuch as the district court had dismissed only the complaint, not the action, and had therefore not made a final order. The court remanded the case with instructions to "permit appellants to file an amended complaint or to secure the entry of a final judgment."

Plaintiffs then filed a status conference statement (with supporting affidavits) in the district court arguing the jurisdictional issue, and, at a March 30, 1984 status conference, the court instructed plaintiffs to submit an order for a default judgment. The court signed the default judgment on May 30, 1984, and it was entered on June 1, 1984. Plaintiffs have made no attempt to execute on it.

Throughout the pendency of this action, plaintiffs sent defendants copies of all significant pleadings filed by them and defendants acknowledge receiving them. On September 4, 1984, plaintiffs mailed (unsigned) copies of the default judgment in English and Spanish to defendants in conformity with 28 U.S.C. § 1608(a) and (e). Defendants received them on October 15, 1984, but did not return the certified mail receipt or take other action. Plaintiffs attempted another mailing in February 1985, but received no receipt. In the absence of any receipt, plaintiffs in March 1985 again resorted to service through the State Department. After receiving the judgment from the Embassy, defendants retained American counsel and filed this motion on April 10, 1985. A hearing was held on December 6, 1985. On January 7,

1986, defendants applied to the Court for leave to file a supplemental memorandum raising a new issue and on January 9, 1986, for leave to file a further declaration to support their motion.

DISCUSSION

Defendants move for relief from the judgment on two grounds: first, that it is void, Fed. R. Civ. P. 60(b)(4), and, second, that it was the result of excusable neglect, Fed. R. Civ. P. 60(b)(1). For the reasons to be discussed, neither ground is meritorious and the motion will therefore be denied.

I. RELIEF UNDER FED R. CIV. P. 60(b)(4)

Defendants' contention that the judgment is void is based on two arguments: first, that this court lacked subject matter jurisdiction over defendants when it entered judgment.

A motion for relief under Rule 60(b)(4) must be made within a reasonable time. See Bookout v. Beck, 354 F.2d 823, 825 (9th Cir. 1965). The judgment was entered on June 1, 1984; the motion was filed on April 10, 1985. Having been filed within a year from entry of judgment and before plaintiffs took steps to execute on it, the motion will be considered timely.

Unlike motions under other provisions of Rule 60(b), this motion is not addressed to the court's discretion. Either the judgment is void or it is valid. The question of the judgment's validity is therefore one of law. Thos. P. Gonzalez Corp. v. Consejo Nacional de Costa Rica, 614 F.2d 1247, 1256 (9th Cir. 1980).

Moreover, defendants have not waived their jurisdictional defenses by failing

to appear. If the judgment was entered without either subject matter or personal jurisdiction, it is void. Thos. P. Gonzalez, supra, 614 F.2d at 1255.

A. The FSIA

Disposition of this motion requires the Court to consider a number of issues arising under the FSIA. That Act has been said to "present[s] a perculiarly twisted exercise in statutory draftsmanship." See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring and dissenting). As a result it has produced a body of case law somewhat obscure and confusing and at times seemingly inconsistent. Nevertheless, application of the statutory provisions to the facts of this case

compels the conclusion that this motion is without merit.

By adopting the FSIA, Congress intended to provide nationwide and uniform regulations for the maintenance of suits against foreign states and their entities in the courts of the United States. 28 U.S.C. § 1330(a) grants to the federal courts original jurisdiction over suits against a foreign state where the foreign state is not entitled to immunity under §§ 1605-1607 of the FSIA. Section 1330(b) provides that personal jurisdiction exists as to such claims where service has been made under § 1608. Thus, the court's first inquiry, whether subject matter jurisdiction exists, entails application of the substantive provisions of the FSIA to determine whether an exception to sovereign immunity applies. See Verlinden B.V. v.

Central Bank of Nigeria, 461 U.S. 480, 493 (1983). Subject matter jurisdiction, or competence, cannot be waived; even if the foreign state has not appeared the district court must determine whether immunity is unavailable under the FSIA. Id. at 494 n.20.

Although a literal reading of § 1330(b) suggests that personal jurisdiction exists whenever service of process is made under § 1608 and an exception to sovereign immunity applies, courts have uniformly imported constitutional due process standards into the statute. See Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300, 313-15 (2d Cir. 1981). Thus, the jurisdictional analysis remains two-fold: the Court must determine, first, whether this case falls within a statutory sovereign immunity exception, and second, whether exercise

of personal jurisdiction is constitutionally permissible. See Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

B. Subject Matter Jurisdiction

The FSIA codifies the principle of sovereign immunity but restricts immunity to claims involving a foreign state's public acts; immunity does not extend to claims based on a state's commercial or private conduct. See H.R. Rep. No. 1847, 94th Cong., 2d Sess., reprinted in 1976 U.S.Code Cong. & Admin. News, 6604, 6605 ("House Report"). Section 1605(a)(2) defines three categories of actions arising out of commercial activity to which immunity is denied:

> (i) actions based on a commercial activity carried on in the United States;

(ii) actions based on an act performed in the United States in connection with a commercial activity elsewhere; and (iii) actions based on an act outside the United States in connection with commercial activity elsewhere where the act causes a direct effect in the United States.

The distinctions between these categories are material and result in somewhat different jurisdictional analyses depending on which category is invoked. In this case, jurisdiction is premised only on the third category. Accordingly, it is immaterial whether defendants conduct commercial activities in the United States or whether they performed acts here in connection with a commercial activity elsewhere. Cf. Vencedora, supra, 730 F.2d at 199.

Applying the third category, the first question is whether defendants' efforts to obtain a loan to finance a housing project in the Dominican Republic constituted a commercial activity within the meaning of § 1605(a)(2). Section 1603(d) states that the commercial character of an activity shall be determined by the activity's nature, and not by reference to its purpose. The House Report explains that if the act is one that could be done by a private person, including a contract for goods or services, it will be considered a commercial activity. House Report, supra at 6615. The fact that goods or services are to be used for a public purpose is irrelevant, id. Therefore, the only relevant facts for this analysis are those pertaining to the contract between plaintiffs and defendants.

Plaintiffs allege that defendants contracted for their services to obtain a loan for them. This is an activity routinely engaged in for profit by private individuals and corporations. Whether the purpose of the loan was public or private is immaterial. Nothing before the Court suggests that this transaction was anything but commercial, and defendants have not contended otherwise.

The pivotal issue in the application of the third category is whether the alleged breach of defendants' contractual obligation to pay plaintiffs a commission had the requisite "direct effect in the United States." The breach, i.e., the refusal to pay, as well as the commercial activity from which it arose all took place outside of the United States and

would eventually have received the commission there had it been paid.

The most closely analogous case is Texas Trading, supra, arising out of the Nigerian government's refusal to honor contracts for the purchase by it of cement. The contracts were backed by letters of credit issued by the Central Bank of Nigeria. That bank used as its agent for making payments to sellers in the United States the Morgan Guaranty Trust Company of New York. The court held that the direct effect clause was satisfied because (1) breach of the contract had a direct effect on the sellers who suffered a resulting financial loss, and (2) the loss occurred in the United States because the sellers were American and were to be paid in the United States.

The instant case presents substantially similar facts. Plaintiffs are United States citizens who have suffered financial injury in the United States as a direct result of defendants' alleged breach. It is true that the contract in this case does not call for payment at a specified bank or other location within the United States. It does, however, provide that the "transaction must be made through our bank . . . and through your [plaintiffs'] bank." (Emphasis added) Thus the contract entitles plaintiffs to specify the place of payment; since plaintiffs reside in the United States, defendants could reasonably have expected that payment would be called for at a bank in the United States.

These circumstance satisfy the direct effect test.[2/] To hold otherwise would tend to frustrate the Congressional purpose of providing "access to the courts" to American citizens aggrieved by the commercial acts of a foreign sovereign. See House Report at 6605. See also Velidor v. L/P/G Benghazi, 653 F.2d 812, 820 n.13 (3rd Cir. 1981) (direct effect where foreign seaman brought to the United States without wages due to defendant's breach of employment contract); Note, Effects Jurisdiction Under the Foreign Sovereign Immunities

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2/ Cases under state law defining direct effect for state jurisdictional purposes are not on point. Those cases concern issues of federalism, not international relations with which Congress was concerned in adopting the FSIA. See Texas Trading, 647 F.2d at 312.

Act and the Due Process Clause, 55 N.Y.U.L. Rev. 474, 508-13 (1980).[3/]

C. Personal Jurisdiction

Defendants' attack on the judgment on the ground of lack of personal jurisdiction raises three issues:

1. May defendants be subject to general jurisdiction, as opposed to jurisdiction based on the transaction sued on?

2. If general jurisdiction is an appropriate standard, is the sufficiency of defendants' contacts to be

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3/ Contract cases must be distinguished from pesonal injury cases; an act injuring a person outside the United States does not have a direct effect in the United States even if it also causes incidental loss to others affected, such as family members in the United States. See Australian Gov't Aircraft Factories v. Lynne, 743 F.2d 672, 675 (9th Cir. 1985); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984).

determined with reference to the entire United States?

3. If not, did defendants' contacts within California suffice to satisfy due process requirements?

1. General Jurisdiction

Defendants contend that only contacts in the United States related to the transaction at issue (specific jurisdiction) are relevant in determining whether the exercise of personal jurisdiction is constitutionally permissible. Acceptance of this contention would greatly contract the direct effect exception of the FSIA, since by definition this exception applies only to commercial activity outside of the United States; commercial activity occurring in whole or in part within the United States is covered by the first two categories of exceptions. Thus, as a matter of statutory

interpretation, this contention must be rejected.

Nor does due process require its acceptance. The Supreme Court enunciated the constitutional limits on the exercise of personal jursidiction over foreign corporations in Helicopteros Nacionales de Colombia v. Hall, __ U.S. __, 104 S.Ct. 1868, 1872 (1984), stating:

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum state, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation. Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952) . . . .

Congress intended to subject foreign states engaging in commercial activities within the scope of § 1605(a)(2) to liability to the same extent as private persons. See 28 U.S.C. § 1606; Verlinden, 461 U.S. at 488-89. Thus, the Court's reasoning applies with equal

force here to deny any constitutional bar to the exercise of general jurisdiction over a foreign defendant.[4/] See also Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985), implicitly adopting the same view. Olsen by Sheldon v. Gov't of Mexico, 729 F.2d 641 (9th Cir. 1984), provides no support for defendants' position. In that action for wrongful death based on state law, the court found sufficient contacts from the transaction at issue to

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4/ The statement that the FSIA collapses subject matter and personal jurisdiction, see McKeel v. Islamic Republic of Iran, 722 F.2d 588, 589-90 n.10 (9th Cir. 1983), does not mandate that more stringent due process reuirements apply under the FSIA. See § A, supra. To the contrary, the due process requirements that courts have read into the statute are only those required by the constitution, and the Supreme Court's ruling in Helicopteros, 104 S.Ct. at 1872, is therefore controlling.

establish specific jurisdiction and therefore found it unnecessary to determine whether general jurisdiction existed. It specifically stated, however, that jurisdiction over a non-resident defendant may be founded on substantial, continuous and systematic contacts with the forum unrelated to the cause of action. Id. at 648. Vencedora, supra, is not in point because that court did not address the personal jurisdiction issue, but held only that where the immunity exception invoked is based on commercial activity carried on in the United States (the first category), commercial activity unrelated to the claim could not support its application. 730 F.2d at 199. Plaintiffs there was a foreign corporation that had suffered harm abroad; since its claim had no substantial nexus with the United States,

it did not and could not invoke the direct effect exception (the third category) at issue here. Harris v. VAO Intertourist, 481 F.Supp. 1056 (E.D.N.Y. 1979), held simply that a plaintiff maintaining a wrongful death action on account of his decedent's death in a hotel fire in Moscow could not show the requisite direct effect within the meaning of the third category. Although the opinion makes no analytical distinction between the subject matter and personal jurisdiction issues, it says no more than the appellate decisions in personal injury actions under the FSIA. See supra, p. 10 n.3. The opinion in Chicago Bridge v. Islamic Repub. of Iran, 506 F.Supp. 981, 989-90 (N.D.Ill. 1980), analyzes personal jurisdiction in terms of the direct effect exception. Its analysis is based in part on the lower

court opinion in Verlinden subsequently reversed by the Supreme Court and on personal injury cases that do not come to grips with the issue of general jurisdiction under the FSIA. None of these cases can be read as lending any support to defendants' position that, either as a matter of statutory interpretation or due process analysis, personal jurisdiction under the FSIA may not be founded on general jurisdiction.

2. Contacts in the United States

Defendants proceed on the assumption that the relevant contacts must be with the forum state, California. But the Supreme Court has noted that jurisdiction under the FSIA is only limited by the requirement of "some form of substantial contact with the United States." Verlinden, 461 U.S. at 490. Defendants rely on cases in which federal

jurisdiction was premised on diversity, see, e.g., Thos. P. Gonzalez, where the court borrowed the state long-arm statute and thus was bound by the same jurisdictional limits as the state courts. By contrast, the FSIA provides its own long-arm statute in § 1330, see House Report at 6612, and § 1608 provides for world-wide service of process.[5/] The court in Texas Trading, noting these factors, ruled that "[s]ince service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely New York [the forum states]." 647 F.2d at 314.

5/ Thus federalism concerns that animate the caselaw where state long-arm statutes are at issue are not present in caess brought under the FSIA.

The court in Texas Trading reasoned by analogy from cases arising under the federal securities acts. 647 F.2d at 314. It is settled that under federal statutes authorizing nationwide service, "the question becomes whether the party has sufficient contacts with the United States, not any particular state." Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315 (9th Cir. 1985). The court there stated that "'minimum contacts' with a particular . . . state for purposes of personal jurisdiction is not a limitation imposed on the federal courts in a federal question case by due process concerns. The Constitution does not require the federal districts to follow state boundaries . . ." Id. at 1315, quoting Johnson v. Creative Arts & Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984)

(emphasis added). See also Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Lesco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340-43 (2d Cir. 1972).

Cases brought under the FSIA are analogous, for they too arise under a federal statute. Verlinden, supra, 461 U.S. at 497. Accordingly, it is the federal court, not the state, that exercises jurisdiction over defendants, and the relevant contacts are those with the United States generally.

The criteria for assessing those contacts were stated in Texas Trading as follows:

> . . . the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. at 314. See also Schmidt v. Polish People's Republic, 579 F.Supp. 23, 28 (S.D.N.Y. 1984).

Applying those factors to the instant transaction, by negotiating for and obtaining the services of American businessmen through the use of the United States mail and phone systems, and agreeing to pay them in United States dollars at their chosen bank, defendants should have foreseen that litigation in this country might follow in the even that they failed to meet their obligations. See Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C.Cir. 1982); Schmidt, 579 F.Supp. at 28. Moreover, defendants have repeatedly availed themselves of the privileges of American law by seeking recourse in the courts of the United States. See Dominican Republic v. Roach, 280 F.2d 59 (D.C.Cir. 1960)

(contract action); Dominican Republic v. Peguero, 225 F.Supp. 342 (S.D.N.Y. 1963) (action to enjoin defendant from acting as Dominican Consul). Equity dictates that one who seeks relief in the United States courts be required to respond to claims for relief against it in those courts. Cf. First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630-32 (1983) (foreign state seeking relief in United States court may not assert sovereign immunity defense to counterclaim). In addition, plaintiffs in their prior memorandum (Docket 30) enumerated numerous contacts by defendants relating to airline operations and tourist promotion in the United States. See also, Arango v. Guzman Travel Advisors Corp., 621 F.2d 1372, 1378 (5th Cir. 1980) (describing Dominican state airline's commercial activities

in United States). Defendants have neither controverted these facts nor come forward with any reason why litigating in the United States would be a hardship for them. Finally, the United States has a strong interest in providing a forum to citizens such as plaintiffs whose efforts to obtain relief in the courts of the Dominican Republic were effectively blocked by defendants. See Affidavit of Meadows (Docket 21). Accordingly, defendants' contacts in the United States are constitutionally sufficient to sustain the exercise of personal jurisdiction.

3. Contacts with California

Even if the relevant contacts were confined to California, defendants' contacts must be found to be sufficiently substantial, continuous and systematic, (see Data Disc, Inc. v. Systems Tech.

Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977), to establish that they have purposefully availed themselves of the privilege of conducting activities within this state. Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Court takes judicial notice of the fact (not denied by defendants) that the Dominican Republic has maintained consulates in San Francisco and Los Angeles for some fifty years. This activity by defendant Dominican Republic is chargeable to its agency, defendant Instituto, since a government maintaining a consulate acts on behalf and for the benefit of all of its constituent parts. See Texas Trading, supra, 647 F.2d at 314. Defendants thus have maintained a substantial and continuous presence in California, availing themselves of the privilege of conducting business here and invoking the

benefits of California law (even apart from their activities in connection with the instant transaction).

None of the cases cited by defendants involve a defendant present in the forum on such a continuous and substantial basis. See, e.g., Paccar Intern., Inc. v. Comm'l Bank of Kuwait, 757 F.2d 1058 (9th Cir. 1985) (specific jurisdiction, lack of general jurisdiction conceded); Thos. P. Gonzalez, supra, at 1249 ("During this period, the Consejo had neither an office, a place of business, property nor an agent in California."). Accordingly, the exercise of personal jurisdiction over defendants in this case is constitutionally permissible under either geographical standard.

4. Instituto as a Separate Entity

In their supplemental memorandum filed in January 1986 following the hearing, defendants contend for the first time that the Instituto is a separate jurisdical entity under Dominican law, and that therefore its acts are not attributable to the Republic. If that were so, the latter would not be properly joined as a defendant and its contacts within the United States would afford no basis for personal jurisdiction over the Instituto, which presumably has none.

For the issue of the Instituto's separateness to be properly before the Court at this stage, it must go directly to the validity of the judgment, i.e., to subject matter or personal jurisdiction. The Supreme Court squarely has held that the FSIA does not "affect the substantive law determining the liability of a

foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." First Nat. City Bank, supra, 462 U.S. at 620. In that case, the Court held that the FSIA did not control whether Cuban assets could be offset against the claims of an instrumentality established and party owned by the Cuban government. It looked instead to a variety of sources of substantive law.

First Nat. City Bank treats the issue of juridical separateness as one of substantive law, not subject matter jurisdiction. It is therefore not open for consideration at this stage, for an error of law is not a ground for vacating a default judgment as void. Jones v. Giles, 741 F.2d 245, 248 (9th Cir. 1984). A fortiori the issue is not open for consideration in determining whether

personal jurisdiction existed. Accordingly, defendants' post-hearing request for leave to file supplemental materials will be denied.

II. RELIEF UNDER FED. R. CIV. P. 60(b)(1)

Defendants also seek relief from the judgment under Rule 60(b)(1) on the ground of "excusable neglect." The rule requires that such a motion "shall be made within a reasonable time, and . . . not more than one year after the judgment . . . was entered or taken." This motion was filed nearly eleven months later. Because plaintiffs did not attempt to execute on the judgment, however, defendants had no compelling incentive to attack the judgment sooner. Accordingly, defendants' Rule 60(b)(1) motion will be considered timely.

A motion under Rule 60(b)(1) is properly denied if plaintiffs will be

prejudiced, or if the culpable conduct of defendants led to the default, or if defendant has not demonstrated a meritorious defense. Pena v. Seguro La Comercial, 770 F.2d 811 (9th Cir. 1985). All three grounds exist here.

A. Defendants' Culpable Conduct

Defendants contend that the judgment should be vacated for excusable neglect, based on reliance on legal advice. The so-called legal advice consists of what defendants describe as an opinion solicited from an "Advisory/Consulting Commission" by the then sub-secretary of the Dominican Republic's Foreign Affairs office. No evidence of the contents of that opinion is before the Court. Defendants offer only the conclusory statement that the opinion was "that the Dominican Republic should not appear before the American tribunals nor be

represented before such courts." Defendants have submitted a number of vague, conclusory and somewhat contradictory declarations and documents but none establish that any reasoned legal advice, based upon an examination of the facts and the law, was given by a competent person and relied upon by a responsible decision maker.

Moreover, allegedly erroneous legal advice is not sufficient to establish excusable neglect where the party is (a) fully informed of the relevant legal considerations, and (b) sufficiently sophisticated and experienced to protect its interests. See Wilson v. Moore & Associates, Inc., 564 F.2d 366, 368 (9th Cir. 1977); United States v. Cirami, 535 F.2d 736 (2d Cir. 1976); Cline v. Hoogland, 518 F.2d 776 (8th Cir. 1975);

Patapoff v. Vollstedt's, Inc., 267 F.2d 863, 865 (9th Cir. 1959).

Defendants were fully informed of the relevant legal considerations by the transmittal note from the State Department, which told them explicitly that failure to appear in response to process could lead to a default judgment and that they should consult American counsel.

Defendants moreover are experienced and sophisticated litigants in American courts. See Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980); Dominican Republic v. Roach, 280 F.2d 59 (D.C.Cir. 1960); Dominican Republic v. Peguero, 225 F.Supp. 342 (D.N.Y. 1963). Indeed, in Arango, the court of appeals decided on July 25, 1980, that the national airline of the Dominican Republic was subject to suit in the United States under the FSIA. It is

difficult to imagine how defendants could have received more authoritative advice about the applicability of the FSIA than the opinion of the court of appeals rendered just six months before this action was filed.

B. Prejudice to Plaintiffs

The transactions on which plaintiffs' claim is based occurred nearly ten years ago. The action was filed five years ago. One witness, Peter Culbertson, has died. One of the plaintiffs, Charles Meadows, is seriously ill and unable to testify. Another witness, Antonia Alma, has disappeared. Defendants' effort to shift the blame for the lapses of time on plaintiffs comes with ill grace considering their adamant and persistent refusals to respond. Having placed substantial obstacles in plaintiffs' way, they are in

no position now to deny the prejudicial consequences of their conduct.

C. Meritorious Defense

Although it is not necessary in view of the foregoing findings, the Court has considered the merits of defendants' position. The documents before the Court are sufficient to establish a written promise to pay plaintiffs a commission if they procured a loan for the Instituto. Whether a binding contract was formed and whether plaintiffs performed under that contract are questions that would have been resolved at trial. They cannot be resolved on the record before the Court. On that record it cannot be said that defendants have meritorious defenses on the merits of the claim. In any event, as explained in §§ B and C, they are not entitled to raise them now. That they

have no jurisdictional defense has heretofore been established.

Conclusion

For the reasons stated, the motion is denied.

IT IS SO ORDERED.

DATED: February 5, 1986

WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARLES V. MEADOWS, and GEORGE HARRIS, Plaintiffs, v. THE DOMINICAN REPUBLIC and INSTITUTO DE AUXILIOS Y VIVIENDAS, Defendants.	No. C-80-4626-WWS ORDER Filed Feb. 25, 1986

Defendants' motion for reconsideration is denied.

IT IS SO ORDERED.

DATED: February 24, 1986

WILLIAM W SCHWARZER
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES V. MEADOWS, GEORGE HARRIS, Plaintiffs-Appellees/ Cross-Appellants, v. THE DOMINICAN REPUBLIC; and INSTITUTO, DE AUXILIOS Y. VIVIENDAS, Defendants-Appellants/ Cross-Appellees.	No. 86-1785 and 86-1843 D.C. NO. CV 80-4626-WWS ORDER Filed July 30, 1987 U.S. Court of Appeals

Appeal from the
United States District Court
for the Northern District of California
William W. Schwarzer,
District Judge, Presiding

Argued and submitted
January 16, 1987
San Francisco, California

Before: HUG, and ALARCON, Circuit Judges, and STEPHENS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Alarcon

have voted to reject the suggestion for a rehearing en banc, Judge Stephens would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The Petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

CONSTITUTION OF THE UNITED STATES

Article I

Section 1

1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section 8

The Congress shall have power ...

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

* * *

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

* * *

18. To make all laws which shall be necessary and proper for carrying into

execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Article II

Section 1

1. The executive power shall be vested in a President of the United States of America....

* * *

Section 2

1. The President shall be commander-in-chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices....

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls....

* * *

Section 3

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournament, he may adjourn them to such time as he shall think proper; he shall receive

ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Article III

Section 1

The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Section 2

The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

AMENDMENT V

Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES

Title 28

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not

confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied

upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity -

1. which is a separate legal person, corporate or otherwise, and

2. which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

3. Which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of

the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property

situated in the United States are in issue; or

(5) not otherwise emcompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss to property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign sate while acting within the scope of his office or employment; except this paragraph shall not apply to -

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation,

deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That --

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing

the suit -- unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b) (1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest. Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns

the vessel or cargo involved: Provided, That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection(b)(1) of this section.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the

law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by persons for whose benefit the action was bought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim --

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been

brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counter claim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the

official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be

made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the

summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence

satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication,

notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided,

That such property is not used

for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality

has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the

giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be

entered against the foreign state, and not to obtain jurisdiction.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exceptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be

immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)

How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or

objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(h)

Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal

defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at th trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 55(c)

Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60(b)

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs or coram nobis, coram vobis, audita querela, and bills of review and bills in the nature

of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.